

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

BERNARD J. FOLIO, an individual, :
and GRANDEOTTO, INC., a :
corporation, :

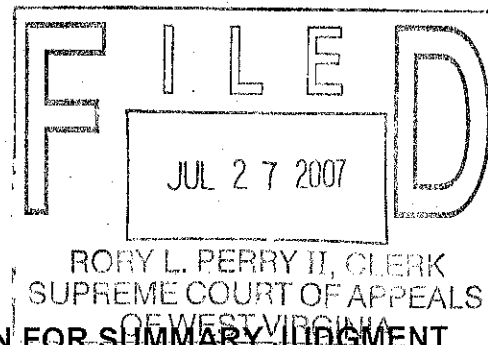
Plaintiffs, :

vs. :

Civil Action No. 04-C-659-1
Judge John Lewis Marks, Jr.

HARRISON-CLARKSBURG HEALTH :
DEPARTMENT and HARRISON- :
CLARKSBURG BOARD OF HEALTH, :
bodies existing under Chapter Sixteen :
of the Code of the State of :
West Virginia, :

Defendants. :



ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Presently pending before the Court are "Defendants [sic] Harrison-Clarksburg Health Department and Harrison-Clarksburg Board of Health's Motion for Summary Judgment" and accompanying memorandum of law, filed April 13, 2006; "Plaintiffs' Response to the Defendant's [sic] Motion for Summary Judgment" and accompanying memorandum of law, filed May 2, 2006; and "Defendants [sic] Harrison-Clarksburg Health Department and Harrison-Clarksburg Board of Health's Reply Memorandum in Support of Motion for Summary Judgment," filed May 8, 2006. The Plaintiffs also filed their March 5, 2007, letter in support, and the Defendants filed their March 7, 2007, letter in opposition.

After reviewing the Defendants' motion, Plaintiffs' response, and Defendants' reply; considering the parties' recent letters and the citations therein; reviewing the Court file; hearing arguments of counsel; studying pertinent legal authority; and after

careful deliberation, the Court is of the opinion that Defendants', Harrison-Clarksburg Health Department and Harrison-Clarksburg Board of Health's, Motion for Summary Judgment should be granted and this case dismissed. In accordance with the foregoing, the Court will set forth its findings of fact and conclusions of law.

Combined Procedural History and Findings of Fact

1. On December 14, 2003, Plaintiffs filed their Complaint against the City of Clarksburg, the Harrison-Clarksburg Health Department ("Health Department"), and the Harrison-Clarksburg Board of Health ("Board of Health"). The allegations against the City of Clarksburg involved the alleged improper composition of the Board of Health. By Order entered June 10, 2005, the Court granted the Defendants' motion to dismiss concerning said issue. The City of Clarksburg was also granted a judgment as a matter of law by Order entered September 6, 2005, and effectively dismissed from the case as a party.

2. The remaining allegations against the Health Department and the Board of Health surround the selection and relocation of the Health Department facilities. By Order entered June 10, 2005, the Court denied Defendants' previous motion to dismiss, which was converted into a motion for summary judgment, on these issues. The Court concluded, *inter alia*, that "minus a showing of fraud, collusion, or palpable abuse of discretion, Plaintiffs' [sic] have no cause of action against the Board or the Department." See Order entered June 10, 2005, at p. 10. The Court also permitted the parties additional time in which to conduct discovery.

3. Defendants subsequently filed their renewed motion for summary judgment and accompanying memorandum of law on April 13, 2006. Plaintiffs then filed

their Response and accompanying memorandum of law on May 2, 2006. Finally, the "Defendants [sic] Harrison-Clarksburg Health Department and Harrison-Clarksburg Board of Health's Reply Memorandum in Support of Motion for Summary Judgment" was filed May 8, 2006. A hearing was held on the issues raised in the parties' filings on December 11, 2006.

4. Attached to Defendants' renewed motion for summary judgment was a copy of the January 20, 2005 "Affidavit of Joseph C. Bundy." Also attached were copies of the verified "Answers of the Plaintiffs to the First Set of Interrogatories of the Defendants Harrison-Clarksburg Health Department and Harrison-Clarksburg Board of Health," dated October 24, 2005; verified "Responses of the Plaintiffs to the First Requests for Production of Documents of the Defendants Harrison-Clarksburg Health Department and Harrison-Clarksburg Board of Health," dated October 24, 2005; verified "Plaintiffs [sic] Answers to the Defendant, City of Clarksburg's Second Set of Interrogatories," dated February 16, 2006; and verified "Plaintiffs [sic] Responses to the Defendant, City of Clarksburg's Second Requests for Production of Documents," dated February 16, 2006. The Court has reviewed Defendants' motion and exhibits as well as their reply.

5. "Plaintiffs' Response to the Defendant's [sic] Motion for Summary Judgment," attached as exhibits minutes from the June 10, 2004, July 13, 2004, and October 19, 2004, Board of Health meetings; a "New Location (Template);" completed "Evaluation" form; Memorandum dated August 25, 2004, from Young Morgan & Cann, PLLC, to the Health Department; and a September 10, 2004, "Proposal for Lease" from Stan Pickens to the Health Department concerning Main Street Realty, Inc., which

owned the Toothman Rice building. The Court has reviewed Plaintiffs' response and exhibits.

6. Although not attached as exhibits to the parties' filings, the Court file contains the original deposition transcripts of Joseph Charles (Chad) Bundy, Executive Director of the Board of Health, taken September 7, 2005; Ron Watson, County Commissioner and Board of Health member, taken March 17, 2006; Mary Ann Iquinto, Board of Health president, taken March 17, 2006; Joyce Rabanal, Board of Health member, taken March 17, 2006; James Jarrett, Board of Health member, taken March 20, 2006; and Frank Ferrari, City Manager and Board of Health member, taken March 20, 2006. All of these individuals were members and/or officers of the Board of Health at the time of the relocation at issue. The Court has reviewed and considered the testimony in these deposition transcripts and has included pertinent portions of those transcripts in the body of this Order.

7. Defendants contend that Plaintiffs are unable to produce any evidence evincing any fraud, collusion, or palpable abuse of discretion in connection with the decision to relocate the Health Department. Defendants also assert that Plaintiffs failed to seek preliminary relief prior to the finalization and implementation of the relocation decision.

8. Plaintiffs argue that the procedures employed by Defendants in the selection of the new site are problematic for several reasons: (1) the Board of Health failed to place a legal advertisement to solicit bids for proposed relocation properties; (2) the Board of Health abdicated its responsibilities and improperly placed its reliance on Chad Bundy, Executive Director, to gather information concerning proposed sites and to

evaluate those sites; (3) the "inherent conflict of interest" arising from the partial ownership interest of Carmine Cann, an attorney in the firm of Young Morgan & Cann, PLLC, in the chosen site; and (4) the price paid for the property.

9. It is an undisputed fact that the Board of Health did not place a legal advertisement for competitive bids in the local newspaper.

10. Although the Board of Health did not place a legal advertisement, there was front-page publicity in the local newspaper, the *Clarksburg Exponent-Telegram*, concerning the relocation and the criteria for the new site. See Deposition of Chad Bundy, p. 12, lines 3-15. A total of 20 total bids was ultimately received. See Plaintiffs' Response, Statement of Facts, p. 2, last paragraph.

11. Assuming *arguendo* that the Board of Health was required to solicit competitive bids via legal advertisement, the Board of Health's failure did not injure Plaintiffs. That is, Plaintiffs contacted County Commissioner Ron Watson and offered their property. See Deposition of Ron Watson, taken March 17, 2006, p. 13, line 2, through p. 14, line 9. Mr. Watson is a member of the Board of Health. *Id.* at p. 3, line 19, through p. 5, line 2.

12. It is an undisputed fact that the Board of Health devised its own methods and procedures for evaluating proposed sites.

13. Joseph Charles (Chad) Bundy, Executive Director of the Board of Health, was directed by City Manager, Tom Vidovich, on June 10, 2004, to create a template (the "New Location (Template)") to present to the Board of Health at the July 4, 2004, meeting concerning the search for a new site. See Deposition of Chad Bundy, taken September 7, 2005, p. 7, lines 21-24; p. 8, lines 1-16; and p. 9, lines 10-15. The Board

of Health members received the template at the July 2004 meeting. - Id. at p.10, lines 1-14. The Board of Health reviewed the template, did not make changes, and approved the same. Id. at p. 10, lines 15-20; p. 11, lines 3-12. The City Manager, Mr. Vidovich, directed that proposals should be evaluated using the template. Id. at p. 11, lines 15-18. Mr. Bundy was directed to evaluate the properties and report his findings to the Board of Health. Id. Late in the evaluation process all of the Board members, except Dr. Shehl, visited the ESI site and Toothman Rice building site at least once, some twice. Id. at p. 12, lines 20-24; p. 13, lines 1-23; p. 17, lines 17-24; p. 18, lines 1-6. Mr. Bundy accompanied Board members to the ESI site. Id. at p. 13, lines 1-13; p. 18, lines 6-7. Mr. Bundy used his template to evaluate the proposals for the properties being offered. Id. at p. 13, line 24; p. 14, lines 1-6. Mr. Bundy also assigned values based upon paperwork provided by the proposer. Id. at p. 28, lines 1-3; p. 29, lines 15-17. Mr. Bundy assigned numbers based upon his evaluation of the properties. Id. at p. 14, lines 7-20. Although Mr. Bundy did not visit every site, he did visit Plaintiffs' site and several others. Id. at p. 14, lines 21-24; p. 15, lines 1-5. Mr. Bundy's visit to Plaintiffs' property, and several other properties, included walking in the interior of the building. Id. at p. 15, lines 6-16. The Board of Health directed that Mr. Bundy place more weight on the criteria of access and visibility. Id. at p. 15, lines 21-24; p. 16, lines 1-10. Mr. Bundy presented the "Evaluation" at the September 21, 2004, Board meeting, as directed. Id. at p. 17, lines 7-8; p. 17, lines 15-16. The Board of Health requested Mr. Bundy's recommendations, and he recommended the Toothman Rice building, which was a lease, and the ESI building, which was a purchase. Id. at p. 17, lines 8-12. Mr. Bundy identified the ESI building and Toothman Rice buildings because they scored highest on

the Board's categories. Id. at p. 19, lines 2-5. The Board of Health did not dispute Mr. Bundy's evaluations. Id. at p. 23, lines 21-23. Mr. Bundy was asked to make a recommendation to the Board, and he recommended the Toothman Rice building based on the higher score and the readiness of the building. Id. at p. 19, lines 6-10. The Board of Health made a decision whether to lease or to purchase. Id. at p. 17, lines 13-14. The ESI building and Toothman Rice building were chosen to be visited based upon Mr. Bundy's evaluation and recommendations to the Board of Health at the September 21, 2004, meeting. Id. at p. 18, lines 8-13. Mr. Bundy did not recommend the Toothman Rice building prior to the September 21, 2004, meeting. Id. at p. 18, lines 14-24. The ESI building, the Toothman Rice building, and Plaintiffs' building (the Rite Aid building), were the top recommended sites. Id. at p. 21, lines 15-16. Mr. Bundy narrowed these three choices further using a different evaluation sheet, but using the same criteria as before. Id. at p. 21, lines 5-24; p. 22, lines 1-2. There was a question or concern about how the numbers on the "Evaluation" sheet were determined, but Mr. Bundy could not identify the individual with the question or concern. Id. at p. 22, lines 3-10. No Board of Health member or any other citizen made any type of comments or otherwise pressured Mr. Bundy to choose one building over another. Id. at p. 22, lines 11-15. Mr. Bundy did not have any conversations with any city council members regarding the relocation of the Health Department. Id. at p. 29, lines 1-4. Mr. Bundy did not have any conversations with Gregory Morgan, City Attorney, regarding the relocation of the Health Department. Id. at p. 29, lines 5-8. Mr. Bundy was aware of Attorney Carmine Cann's ownership interest in the Toothman Rice building prior to the instant lawsuit. Id. at p. 23, line 24; p. 24, lines 1-9. Mr. Bundy was aware of this ownership interest prior

to his assignment of values on the "Evaluation." Id. at p. 24, lines 10-15. He learned of Mr. Cann's ownership interest before September 1, 2004, because Main Street Realty, Inc., sent a letter stating its interest. Id. at p. 24, lines 16-21. Mr. Bundy made his recommendations to the Board of Health at the September 21, 2004, meeting prior to his visiting the Rite Aid building. Id. at p. 25, lines 9-12. The reason was the Rite Aid building had not been "built out." Id. at p. 25, lines 13-15. Rite Aid's proposal stated that the building required substantial build out, and Mr. Bundy recommended buildings that "were ready to go as is." Id. at p. 25, lines 15-17. Although the Toothman Rice building needed an elevator, the elevator was not one of the original criterion for selection. Id. at p. 25, lines 20-21. "The complete build out was fostered by Main Street Realty." Id. at p. 25, lines 22-24; p. 26, line 1. The 5000 square feet of dry storage (in the Toothman Rice building) was a "great value" to the Health Department. Id. at p. 26, lines 16-18. Deposition Exhibit 1 is the "Evaluation," and Deposition Exhibit 2 is the Template.

14. Ron Watson, County Commissioner and Board of Health member, testified that Mr. Bundy was charged with the responsibility of inventorying the properties available, "looking at where we've been, where we're at, and where we want to go." See Deposition, Ron Watson, taken March 17, 2006, at p. 10, lines 15-23. Mr. Watson recalled that Mr. Bundy was directed to "advertise the Board's plan in the newspaper." Id. at p. 11, lines 1-3. Although Mr. Watson was aware there was an article in the paper, he was not aware that there was no actual advertisement taken for soliciting bids. Id. at p. 11, lines 4-7. Mr. Watson testified that governmental bodies normally go through a bid process to acquire property. Id. at p. 11, lines 18-23. As part of that bid process, there would be advertising with specifications of what the agency or

governmental body was searching for. Id. at p. 12, lines 1-4. Mr. Watson did not know whether the advertising was not done. Id. at p. 12, lines 5-8. Regardless of whether advertising was not done, the Board of Health began receiving bids from the newspaper. Id. at p. 12, lines 9-13. Mr. Watson's role as Board of Health member was to vote on the recommendation of staff. Id. at p. 12, lines 14-17. Plaintiffs (Mr. Folio) contacted Mr. Watson concerning the consideration of their proposed site. Id. at p. 13, lines 2-24; p. 14, lines 1-2. Mr. Watson visited the ESI building, Plaintiffs' building (the Rite Aid building), and the Toothman and Rice building. Id. at p. 14, lines 9-11. Mr. Watson's decision to visit these three sites was based upon recommendations from staff. Id. at p. 14, line 24; p. 15, line 1. Plaintiffs' attorney, Jerry Blair, inquired as to what Mr. Watson meant by "staff":

Q. And by staff -- you said that several times -- you mean people who work at --[.]

A. Directly the administrator, Bundy. He was charged with the responsibilities of bringing it to the table.

Id. at p. 15, lines 2-6. Mr. Bundy was the Administrator at the agency, and one of the reasons that the Board had Mr. Bundy was for a reason such as this, i.e. so that Mr. Bundy could provide recommendations to the Board. Id. at p. 26, lines 10-17. Mr. Watson also recognized Deposition Exhibit 1 as the Template given to the Board of Health by Administrator Bundy for discussion and probably for approval. Id. at p. 15, lines 15-24, p. 16, lines 1-4. Mr. Watson assumed that the Board of Health directed Mr. Bundy to create the Template. Id. at p. 16, lines 9-13. Mr. Watson also recognized Deposition Exhibit 2, which was entitled, "Evaluation." Id. at p. 16, lines 14-18. Mr. Bundy assigned scores to each of the proposed properties. Id. at p. 16, line 24, p. 17,

lines 1-2. Mr. Bundy administered the entire bid process and recommended how that process would be performed. Id. at p. 23, lines 11-18. Mr. Watson testified that the minutes would reflect the Board's input and decision-making concerning any recommendations that came to the Board. Id. at p. 23, lines 21-24. Mr. Watson did not recall any written document instructing on the scoring of properties. Id. at p. 17, lines 3-7. He also did not recall if he or any Board members inquired into how each score was derived. Id. at p. 17, lines 8-11. Mr. Watson did not recall anyone objecting to the scoring of the proposed properties. Id. at p. 17, lines 12-18. Whether the category of "access and visibility" received more weight would have had to have been approved by the Board and may have been recommended. Id. at p. 19, lines 11-15. The Board would have to approve whatever action Mr. Bundy was directed to perform. Id. Mr. Watson saw Deposition Exhibits 1 and 2 before, and these forms were likely discussed in the Board of Health's Executive Session in which no meeting minutes are taken. Id. at p. 20, lines 4-20. No one exerted any influence upon Mr. Watson concerning any particular property. Id. at p. 21, lines 12-18. No one from the City of Clarksburg attempted to influence Mr. Watson. Id. at p. 21, lines 19-24; p. 22, lines 13-14. Mr. Watson did not recall any specific discussions with Board members that may not have been reflected in the minutes. Id. at p. 22, lines 23-24; p. 23, lines 1-4. Mr. Watson did not have knowledge about who owned the Toothman Rice building. Id. at p. 22, lines 15-22. In fact, Mr. Watson did not learn who owned the Toothman Rice building until after it was decided that the Toothman Rice building would be the relocation site. Id. at p. 27, lines 7-19. Mr. Watson did know that Plaintiffs (Mr. Folio) owned the Rite Aid building. Id. The Toothman Rice building was approved for relocation because it was

the "best available facility" from the top three sites. Id. at p. 23, lines 5-10. Mr. Watson believed the right choice was made. Id. at p. 27, lines 4-5. Even though the Board relied upon the data and values assigned by Mr. Bundy to the properties, the Board made the decision to select the Toothman Rice building. Id. at p. 25, lines 14-21.

15. The County Commission appointed Mary Ann Iquinto to the Board of Health. See Deposition of Mary Ann Iquinto, taken March 17, 2006, p. 4, lines 8-11. Ms. Iquinto was the president of the Board during the relocation process. Id. at p. 4, lines 16-18. Two of the biggest reasons for relocating were handicapped accessibility and lack of space. Id. at p. 7, lines 8-17; p. 8, lines 1-3. Mr. Bundy was employed as a director and was expressly given direction about how to accomplish soliciting for other locations. Id. at p. 8, lines 11-18. Ms. Iquinto thought that Mr. Bundy was told to begin looking for properties. Id. at p. 8, lines 19-22. "The Board left it pretty open to him because there were varying opinions on what we wanted to look at, what we wanted to do and how we wanted to carry it out." Id. at p. 8, lines 22-24; p. 9, lines 1-3. Ms. Iquinto did not recall whether the Board's instructions were given in executive session or in an open meeting. Id. at p. 9, lines 4-7. Ms. Iquinto recalled Mr. Bundy being directed to start the advertising process to solicit bids for proposals for a new location. Id. at p. 9, lines 8-11. Ms. Iquinto did not recall whether advertising was done. Id. at p. 9, lines 12-17. Mr. Bundy constructed a bid and consideration process. Id. at p. 9, lines 18-22. Ms. Iquinto did not recall whether advertising was done for previous Health Department relocations. Id. at p. 9, lines 22-24; p. 10, lines 1-3. Mr. Bundy created a plan for how the Board would receive proposals, and he reported that to the Board in writing. Id. at p. 10, lines 13-21. Ms. Iquinto understood that the Board would need to conduct a

bidding process to obtain proposals for potential locations and to evaluate them. Id. at p. 11, lines 5-11. Ms. Iquinto did not remember seeing Deposition Exhibit 1, the Template. Id. at p. 11, lines 14-21. Ms. Iquinto recognized Deposition Exhibit 2, entitled, "Evaluation." Id. at p. 11, lines 22-24; p. 12, lines 1-5. The scores were assigned by Mr. Bundy, who derived the scores by his own personal evaluation of each site. Id. at p. 12, lines 10-17. There was no objective point value for the scores assigned. Id. at p. 12, lines 18-24; p. 13, lines 1-8. Ms. Iquinto visited the Toothman Rice building and ESI building because they had the highest scores on the "Evaluation" sheet. Id. at p. 13, lines 9-19. No one attempted to exert influence over Ms. Iquinto in the choice of relocation properties. Id. at p. 13, lines 20-24; p. 14, lines 1-9. No one from the City of Clarksburg communicated with Ms. Iquinto or made any suggestions about which property to choose. Id. at p. 14, lines 10-16. The owners of the Toothman Rice building did not contact her regarding their property. Id. at p. 14, lines 17-19. Ms. Iquinto did have knowledge that Carmine Cann owned part of the Toothman Rice building at the time she voted for that property. Id. at p. 14, lines 20-24; p. 15, lines 1-2. Ms. Iquinto was aware that Mr. Cann was a member of the law firm that represents the City of Clarksburg. Id. at p. 15, lines 3-6. Ms. Iquinto had no pause for concern about whether there might be a conflict of interest. Id. at p. 15, lines 7-10. No discussions with any Board members took place outside of the context of any meeting. Id. at p. 16, lines 1-4. Although Ms. Iquinto did not vote, she believed the Toothman Rice building was the "best site." Id. at p. 15, lines 13-14. Ms. Iquinto believed the Toothman Rice building was the best site because of its accessibility and space. Id. at p. 16, lines 16-20. Ms. Iquinto did not usually vote unless there was a tie. Id. at p. 15, lines 15-19. An

elevator, which was paid for by the Health Department, was installed in the new site. Id. at p. 16, lines 21-24; p. 17, lines 1-5. Ms. Iquinto recalled looking at all available proposals from property owners, which were provided to her by Mr. Bundy. Id. at p. 18, lines 7-20.

16. The County Commission appointed Joyce Rabanal to the Board of Health. See Deposition of Joyce Rabanal, taken March 17, 2006, at p. 4, lines 6-19. The relocation was necessary because the lease was going to expire and a decision needed to be made on whether to renew the lease or move. Id. at p. 6, lines 1-6. The needs that Ms. Rabanal believed necessitated the move included "[n]ot enough room, the close proximity of all the departments within the Health Department, very little privacy." Id. at p. 6, lines 7-11. Those needs had been expressed to Ms. Rabanal by citizens who use the services and Health Department staff. Id. at p. 6, lines 12-15. Ms. Rabanal attended Board meetings when the decision was made to advertise and to solicit bids for new locations. Id. at p. 6, lines 16-19. Ms. Rabanal believed the application process and the accepting of bids was placed into the newspaper. Id. at p. 6, lines 20-24; p. 7, line 1. The press is usually at Board Meetings. Id. at p. 7, lines 7-13. Mr. Bundy normally communicated with the newspaper. Id. at p. 7, lines 17-19. The Board of Health charged Mr. Bundy with seeking bids and reporting back to the Board. Id. at p. 7, line 24; p. 8, line 1. The Board did not give Mr. Bundy specifications at that point. Id. at p. 8, lines 2-7. Ms. Rabanal could not remember Deposition Exhibits 1, the Template, and 2, the "Evaluation." Id. at p. 8, lines 14-24; p. 9, lines 1-9. Ms. Rabanal visited the ESI building and Toothman Rice building because they were the top choices. Id. at p. 9, lines 10-20; p. 10, lines 1-3. The top site choices were made by a

consensus of the Board. Id. at p. 10, lines 4-8. The Board narrowed the choices to these two properties by considering its needs, the property's size, and the templates the Board viewed to fit its needs. Id. at p. 10, lines 9-13. Size and cost were two factors that helped narrow the choices. Id. at p. 10, lines 14-18. Ms. Rabanal recalled the information in Deposition Exhibit 2 ("Evaluation") being utilized to conclude that visits should be made to the ESI building and the Toothman Rice building. Id. at p. 10, lines 23-24; p. 11, lines 1-11. Ms. Rabanal did not recall reviewing any actual proposals. Id. at p. 11, lines 21-24; p. 12, lines 1-3. The Board of Health unanimously decided to relocate to the Toothman Rice building. Id. at p. 12, lines 10-13. Ms. Rabanal did not have any conversations with property owners who submitted bids or anyone on their behalf trying to influence her decision about which property to choose. Id. at p. 12, lines 14-18. Ms. Rabanal did not have any discussions with Plaintiffs. Id. at p. 12, lines 19-24. No government officials with the City of Clarksburg, with the County, or anyone else, attempted to influence Ms. Rabanal's decision as to the relocation site. Id. at p. 13, lines 1-5. Board members did not attempt to sway her. Id. at p. 13, lines 6-9. Ms. Rabanal did not recall having any conversations with any Board members regarding the relocation outside of a Board meeting. Id. at p. 13, line 10-13. She did not recall any decisions made regarding the relocation that took place in executive session as opposed to a public meeting. Id. at p. 13, lines 14-18. Ms. Rabanal approved the Toothman Rice site because there were very little renovations that needed to be done. Id. at p. 15, lines 9-18. The Health Department was able to move into it relatively easy, and it was the size the Board needed. Id. Ms. Rabanal recalled an elevator being put into the building. Id. at p. 15, lines 19-24; p. 16, lines 1-4. Ms. Rabanal did not have

any knowledge about who owned the Toothman Rice building at the time the Board voted to approve it as the relocation site. Id. at p. 16, lines 5-8. Ms. Rabanal subsequently learned who owned the building. Id. at p. 16, lines 9-11. The identity of the building's owner would not have had any impact on Ms. Rabanal's decision. Id. at p. 16, lines 17-24; p. 17, lines 1-4. Ms. Rabanal believed the scores assigned to properties in Mr. Bundy's "Evaluation" were objective. Id. at p. 17, lines 5-16. Ms. Rabanal also believed she knew the specific criteria assigned to the numbers at the time of the relocation decision. Id.

17. The County Commission appointed James Jarrett to the Board of Health. See Deposition of James Jarrett, taken March 20, 2006, p. 5, lines 2-4. The idea of relocating the Health Department offices occurred the first day he went on the Board six years prior. Id. at p. 5, lines 12-17. One of Mr. Jarrett's reasons for getting on the Board was to get the Health Department "out of that rat- and bat-infested place that they were in and get them in somewhere they could have decent living quarters." Id. at p. 5, lines 18-22. The idea to relocate crystallized after Chad Bundy was hired. Id. at p. 7, lines 4-11. That was the time "...we had somebody that would do what the Board's intention was to do, and that was to get out and scout out some places[.]" Id. at p. 7, lines 8-11. Mr. Bundy was to be the "eyes and ears" for the Board and "to go out and try to procure places for us to evaluate." Id. at p. 7, lines 12-16. Although there was "plenty" of newspaper coverage regarding the relocation, Mr. Jarrett could not remember a decision to advertise or whether the relocation had been advertised. Id. at p. 7, lines 17-24. Mr. Jarrett could not remember or did not know whether the Board gave Mr. Bundy direction regarding how the proposal or bid process would be

performed. Id. at p. 8, lines 1-12. If anyone on the Board had any ideas, he/she was to let Mr. Bundy, or someone, know so that the Board could review them. Id. at p. 8, lines 9-18. Mr. Jarrett recalled Deposition Exhibit 2, the "Evaluation." Id. at p. 8, lines 19-24; p. 9, line 1. Mr. Jarrett did not know the origin of the numbers in the cells on the "Evaluation" form and did not know how Mr. Bundy arrived at those numbers. Id. at p. 9, lines 2-10. Mr. Jarrett visited the ESI site and the Toothman Rice site. Id. at p. 9, lines 18-24; p. 10, lines 1-13. Mr. Bundy encouraged the Board "to go to any and all places that we could go." Id. at p. 10, lines 14-21. "Most of the places I either was aware of, did a drive, windshield size-up on, or said, 'Okay, hey, this has some possibilities.'" Id. at p. 10, lines 21-24. The "number-one possibility" was ESI. Id. at p. 11, lines 1-2. The next place Mr. Jarrett went was Toothman Rice, and "[he] was totally impressed." Id. at p. 11, lines 2-4. In his opinion, the Toothman Rice building was the better choice of the two sites. Id. at p. 11, lines 6-10. None of the property owners or their representatives contacted Mr. Jarrett directly about their sites. Id. at p. 11, lines 11-21. Mr. Jarrett did not know any of the owners of the buildings, with the possible exception of the Shinn Plaza Apartments. Id. No one from the general public or the government attempted to influence Mr. Jarrett's choice. Id. at p. 12, lines 1-5. Mr. Jarrett did not remember Deposition Exhibit 1, the Template. Id. at p. 13, lines 14-20. When asked if he were contacted by Mr. Folio or any member of Plaintiffs' family, Mr. Jarrett replied that he had not met and did not know Mr. Folio or his family. Id. at p. 14, lines 1-5. Mr. Bundy let the Board make the evaluation as to the best location. Id. at p. 12, lines 6-11. "He put out the descriptions like this of the building, and we made the decision on it." Id. Mr. Jarrett did not recall Mr. Bundy recommending that the

Toothman Rice building was the best facility. Id. at p. 12, lines 12-21. "However, if [Mr. Bundy's] the one that made this ["Evaluation"], and I believe he did and that it came up with the best numbers, I would think that that would be without saying, that that was probably where he was leaning for. But that was a completely objective evaluation, as far as I was concerned." Id. at p. 12, lines 12-24; p. 13, lines 1-2. The Board's direction to Mr. Bundy was to have him review everything and be the Board's "eyes and ears and fingers." Id. at p. 13, lines 3-13. Mr. Jarrett did not recall having any discussions about the relocation during executive session. Id. at p. 14, lines 6-19.

18. Frank L. Ferrari was City Manager and, by virtue of being City Manager, was a voting member of the Board of Health from August 10, 2004, to September 15, 2005. See Deposition of Frank L. Ferrari, taken March 20, 2006, p. 4, lines 16-24; p. 5, lines 1-13. The idea of relocating occurred during Mr. Ferrari's term as a member of the Board. Id. at p. 6, lines 8-16. As a member of the Board, Mr. Ferrari basically followed the lead of Mr. Bundy, Executive Director. Id. at p. 8, lines 6-11. Mr. Bundy handled the process and presented the Board with information. Id. at p. 8, lines 11-12. The Board had the final decision as to what and where the offices would be relocated. Id. at p. 8, lines 12-14. "Basically [sic] we were just reviewing the information that was provided to us." Id. at p. 8, lines 14-15. "Mr. Bundy, as executive director, presented proposals to the Board of various locations where, I guess proposals that were received from various owners, tenants, or whatever, as far as possible sites for the office location. And basically from that process, from that point is when the process began, when the Board made the final decision." Id. at p. 9, lines 6-17. Mr. Ferrari did not see the proposals, but reviewed what Mr. Bundy provided. Id. at p. 9, lines 8-22. Mr. Bundy provided a

summary of the proposals and "valuations and various information on all the different proposals." Id. at p. 9, lines 23-24; p. 10, lines 1-3. Mr. Ferrari recalled seeing an evaluation sheet provided by Mr. Bundy, but was uncertain whether it was Deposition Exhibit No. 2, entitled "Evaluation." Id. at p. 10, lines 9-17. Mr. Bundy assigned the numerical scores. Id. at p. 10, lines 18-21. Mr. Ferrari gave a final vote concerning the relocation. Id. at p. 10, lines 22-24; p. 11, line 1. Other information weighed into the relocation decision, not just Mr. Bundy's "Evaluation" sheet. Id. at p. 11, lines 2-6. "There was a summary of all the proposals, what was actually offered by the owners. There was prices, as far as rent rates, renovation costs, so on and so forth. So, basically, this is not the only thing we looked at in making the decision." Id. at p. 11, lines 7-15. Mr. Bundy explained the numbers he assigned in the cells of the "Evaluation" form to the Board. Id. at p. 13, lines 11-24; p. 14, lines 1-10. Mr. Ferrari did not know how the "Evaluation" sheet categories were decided upon. Id. at p. 14, lines 19-23. Mr. Ferrari was not aware that an advertisement soliciting bids had not been placed. Id. at p. 15, lines 1-4. Mr. Ferrari visited the Toothman Rice building and a couple others. Id. at p. 15, lines 5-18. Mr. Bundy took some of the Board members around to some of the sites. Id. No one attempted to influence Mr. Ferrari's vote for the Toothman Rice building. Id. at p. 16, lines 2-4; p. 16, lines 5-24. Mr. Ferrari remembered talking to City Council, which gave its input. Id. at p. 16, lines 5-21. Mr. Ferrari talked to other people, including people on the street. Id. There were "a lot of newspaper articles about the move and so on." Id. at p. 16, lines 22-23. The City Council wanted the Health Department to remain downtown. Id. at p. 16, lines 20-21; p. 17, lines 3-5. In spite of these "communications," no one influenced Mr. Ferrari's

decision. Id. at p. 17, lines 1-2. Carmine Cann called Mr. Ferrari and advised that "they had submitted a proposal for the office location." Id. at p. 18, lines 1-3. Mr. Ferrari advised Mr. Cann that a number of proposals were received and that Mr. Bundy would provide information to the Board. Id. at p. 18, lines 3-8. That was the extent of the conversation. Id. at p. 18, lines 7-8. Mr. Cann did not attempt to influence Mr. Ferrari, just provide information. Id. at p. 18, lines 9-15. Mr. Ferrari did not believe that Mr. Cann was attempting to influence his vote in any way. Id. at p. 21, lines 6-10. Mr. Ferrari did not have any concerns and did not really think about any potential conflict of interest with Mr. Cann's site. Id. at p. 18, lines 16-23. Mr. Ferrari did not have any conversations concerning relocation with Plaintiffs or any Board members outside of sessions. Id. at p. 18, line 24; p. 19, lines 1-10. The Board discussed relocation during executive sessions. Id. at p. 19, lines 11-19. Mr. Ferrari voted for the Toothman Rice site because "it was the best proposal, pure and simple." Id. at p. 21, lines 11-15. The Board felt it was the best way to go after "looking at everything and reviewing everything that Mr. Bundy provided." Id. at p. 21, lines 16-22. Mr. Ferrari could not recall Deposition Exhibit No. 1, the Template. Id. at p. 21, lines 23-24; p. 22, lines 1-3.

19. Depositions of the Board of Health members at the time of the relocation reveal that the Board of Health directed Chad Bundy, Executive Director, to gather bids, compile proposal information, make evaluations using the methods he devised with the Board's oversight and approval, and to make recommendations to the Board of Health. The Board of Health members considered this information and materials provided by the bidders, visited the top site choices (including Plaintiffs' Rite Aid building site), and voted on what it determined to be the best property, i.e. the Toothman Rice building.

20. It is an undisputed fact that the Toothman Rice property purchased by the Board of Health was owned in part by Carmine Cann, an attorney in the firm of Young, Morgan & Cann, PLLC. Gregory Morgan, an attorney at the firm of Young, Morgan & Cann, PLLC, does represent the City of Clarksburg on occasion. However, the Court finds that Plaintiffs have failed to show how this fact alone disqualifies this particular property from the Board of Health's consideration.

21. Deposition testimony of the Board of Health members reveals that none of the Board members were improperly influenced or swayed by anyone to purchase any particular property.

22. Plaintiffs contend that another reason the Toothman Rice building was a poor choice was because of the building's cost. However, the Plaintiffs have failed to put forth any evidence showing that the building's cost is anything other than a mere difference of opinion. In fact, Plaintiffs did not produce any evidence or make a clear showing that the amount paid for the Toothman Rice building was in excess of the market value of the building.

23. The Court finds that the Defendants' renewed motion for summary judgment shows there is no genuine issue of material fact. In that vein, Plaintiffs have not met their burden of production in rehabilitating the evidence attacked by Defendants and have not produced additional evidence showing the existence of a genuine issue for trial. Giving Plaintiffs every permissible inference from the underlying facts in the light most favorable to Plaintiffs, Plaintiffs cannot show a genuine issue of material fact exists. Importantly, Plaintiffs' mere allegations and argument are insufficient to overcome Defendants' Motion.

24. The Court finds that there is no evidence of actual fraud in the relocation of the Health Department. Therefore, there are no factual issues to be decided by jury.

25. The Court finds that there is no evidence of collusion in the relocation of the Health Department. Therefore, there are no factual issues to be decided by jury.

26. The Court finds that there is no evidence of palpable abuse of discretion in the relocation of the Health Department and, thus, no factual issues to be decided by jury.

27. The Court finds that the Plaintiffs have failed to prove that the Defendants breached any legal or equitable duty that tended to deceive others, tended to violate public or private confidence, or tended to injure public interest. Thus, the Court finds there is no evidence of constructive fraud in the relocation of the Health Department and there is no fact issue to be decided by jury.

28. The Court finds that no legal authority exists requiring the Board of Health to obtain competitive bids by legal advertisement.

29. The Court finds that no legal authority exists barring the Board of Health from devising its own methods and procedures for the evaluation of properties.

Conclusions of Law

1. West Virginia Rule of Civil Procedure 56(c) [1998] provides, "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law."

2. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963). "The question to be decided on a motion for summary judgment is whether there is a genuine issue of fact and not how that issue should be determined." Id. at Syl. Pt. 5. "A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment." Id. at Syl. Pt. 6.

3. The Court concludes that there is no genuine issue of material fact to be tried on any issues that Plaintiffs raise.

4. "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 2, Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E.2d 329 (1995).

5. The Court concludes that, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for Plaintiffs on any issue.

6. "If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining

why further discovery is necessary as provided in Rule 26(f) of the West Virginia Rules of Civil Procedure." Syl. Pt. 3, Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E.2d 329 (1995).

7. The Court concludes that Defendants have shown that no genuine issue of material fact exists. The Court further concludes that Plaintiffs failed to rehabilitate and produce additional evidence, even after the Court gave them the opportunity to conduct additional discovery.

8. "Under the provisions of Rule 56 of the West Virginia Rules of Civil Procedure, when the moving party presents depositions, interrogatories, affidavits or otherwise indicates there is no genuine issue as to any material fact, the resisting party to avoid summary judgment must present some evidence that the facts are in dispute." Syl. Pt. 2, Guthrie v. Northwestern Mut. Life Ins. Co., 158 W.Va. 1, 208 S.E.2d 60 (1974).

9. "Roughly stated, a 'genuine issue' for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed 'material' facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law." Syl. Pt. 5, Jividen v. Law, 194 W.Va. 705, 461 S.E.2d 451 (1995).

10. The Court concludes that Plaintiffs did not present any evidence showing that the facts are in dispute as to any issue that Plaintiffs raise.

11. Moreover, "[t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. Pt. 3, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994). "We, therefore, must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion." Id. at 758.

12. The Court concludes that after drawing any permissible inferences from the underlying facts in the light most favorable to Plaintiffs there exist no genuine issues of material fact.

13. "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." W.Va. R. Civ. P. 56(e) [1998], in part.

14. "Summary judgment cannot be defeated on the basis of factual assertions contained in the brief of the party opposing a motion for such judgment." Syl. Pt. 3, Guthrie v. Northwestern Mut. Life Ins. Co., 158 W.Va. 1, 208 S.E.2d 60 (1974).

15. The Court concludes that Plaintiffs essentially rely on argument and allegations to overcome Defendants' Motion for Summary Judgment.

16. "[T]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere 'scintilla of evidence,' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." Painter v. Peavy,

192 W.Va. 189, 192-93, 451 S.E.2d 755, 758-59 (1994) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)).

17. The Court concludes that Plaintiffs have made argument and allegations, but have not produced anything more than "a mere 'scintilla of evidence'" in support of their contentions. The Court finds that there is not sufficient evidence for a reasonable jury to find in Plaintiffs' favor on any issues they raise.

18. The local board of health is required to "[p]rovide equipment and facilities for the local health department that are in compliance with federal and state law." W.Va. Code § 16-2-11(a)(4) [2000].

19. The Court concludes that no legal authority exists that requires the Board of Health to obtain a legal advertisement for procuring competitive bids in the purchase of a building.

20. The Court concludes that no legal authority exists to prohibit the Board of Health from delegating tasks and duties to certain of its members in the furtherance of the Board's objectives.

21. "The mere fact that a particular cause of action contains elements which typically raise a factual issue for jury determination does not automatically immunize the case from summary judgment. The plaintiff must still discharge his or her burden under West Virginia Rule of Civil Procedure 56(c) by demonstrating that a legitimate jury question, i.e. a genuine issue of material fact, is present." Syl. Pt. 1, Jividen v. Law, 194 W.Va. 705, 461 S.E.2d 451 (1995).

22. Generally, fraud is a question of fact to be determined by the jury from all the circumstances of the case. Kessel v. Leavitt, 204 W.Va. 95, 511 S.E.2d 720 (1998), fn. 38 (internal citations omitted).

23. The Court concludes that although fraud is typically a question of fact to be determined by the jury from all of the circumstances of the case, the Plaintiffs have not demonstrated a genuine issue of material fact exists.

24. "Where a power is vested in a public authority, and the exercise of such power is allegedly tainted by fraud, the same may be set aside at the suit of a citizen and taxpayer of the political subdivision in which such authority is permitted to function." Syl. Pt. 1, Miller v. Huntington & Ohio Bridge Co., 123 W.Va. 320, 15 S.E.2d 687 (1941).

25. "'Actual fraud' is intentional fraud and consists in deception, intentionally practiced to induce another to part with property or to surrender some legal right and which accomplishes the end designed." Syllabus, Miller v. Huntington & Ohio Bridge Co., 123 W.Va. 320, 15 S.E.2d 687 (1941).

26. "'Constructive fraud' is a breach of legal or equitable duty which irrespective of moral guilt of the fraud feisor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interest, and neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud, whereas intent to deceive is an essential element of actual fraud, the presence or absence of such intent distinguishes actual from constructive fraud." Id.

27. "A court will not ordinarily interfere with the action of a public officer or tribunal clothed with discretion, in the absence of a clear showing of fraud, collusion or

palpable abuse of discretion." Syl. Pt. 2, Bane v. Bd. of Educ. of Monongalia County, 178 W.Va. 749, 364 S.E.2d 540 (1987) (internal citations omitted). See also Sticklen v. Kittle, 168 W.Va. 147, 166, 287 S.E.2d 148, 158 (1981) (involving selection of school site by a county board of education) and Harrison v. City of Huntington, 141 W.Va. 774, 781-82, 93 S.E.2d 221, 224 (1956) (suit against city and mayor challenging award of municipal contract).

28. The Court concludes that Plaintiffs have produced no evidence of fraud whatsoever, either actual or constructive. With regard to the issue of constructive fraud, the Court further concludes that Plaintiffs have failed to prove that the Defendants breached any legal or equitable duty that tended to deceive others, tended to violate public or private confidence, or tended to injure public interest. Consequently, there are no factual questions for jury determination.

29. The Court concludes that Plaintiffs have produced no evidence that Defendants' conduct amounts to a palpable abuse of discretion. As a result, no factual questions are presented for jury determination.

30. Collusion is defined as, "[a]n agreement to defraud another or to obtain something forbidden by law." BLACK'S LAW DICTIONARY 259 (7th ed. 1999).

31. The Court concludes that Plaintiffs have produced no evidence of collusion and that no factual questions are presented for jury determination.

32. "Where it is sought to set aside the purchase of any property which a county court may lawfully acquire, on the ground that the price paid therefor was so excessive as to constitute constructive fraud, there must be a clear showing that the amount paid therefor was in excess of the market value thereof, to the extent that it

plainly appears that in fixing the price to be paid a reasonable discretion was not exercised by the court." Syl. Pt. 6, Miller v. Huntington & Ohio Bridge Co., 123 W.Va. 320, 15 S.E.2d 687 (1941).

33. "Where the question of the market value of property is one on which reasonable minds may differ, the purchase thereof by a county court, at a price within the range of the differences of opinion as to its value, will not be set aside as constructively fraudulent on the grounds of excessiveness in the price paid." Id. at Syl. Pt. 7.

34. The Court concludes that Plaintiffs have put forth no evidence showing that the cost of the Toothman Rice building was so excessive as to constitute constructive fraud. In fact, Plaintiffs did not produce any evidence or make a clear showing that the amount paid for the Toothman Rice building was in excess of the market value of the building.

35. Therefore, the Court concludes that Defendants' renewed Motion for Summary Judgment should be granted and that Plaintiffs' case against the remaining Defendants should be dismissed.

Rulings.

For all of the foregoing reasons, it is, therefore, accordingly ORDERED that Defendants' motion for summary judgment should be and the same is hereby **GRANTED.**

It is, further, ORDERED that the Complaint against the remaining Defendants should be and the same is hereby **DISMISSED.**

The Circuit Clerk is directed to remove this case from the Court's docket.

The Circuit Clerk is further directed to provide certified copies of this Order
to the following:

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ENTER: March 13, 2007

John Lewis Marks, Jr.
The Hon. John Lewis Marks, Jr., Judge